Filed 6/22/16 P. v. Dowdell CA2/8

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL ANTHONY DOWDELL, Defendant and Appellant.	B262946 (Los Angeles County Super. Ct. No. MA061325)

APPEAL from a judgment of the Superior Court of Los Angeles County, Bernie C. LaForteza, Judge. Affirmed in part, reversed and remanded.

Juliana Drous, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews and David E. Madeo, Deputy Attorneys General, for Plaintiff and Respondent.

In October 2013, defendant and appellant Michael Dowdell was involved in a street confrontation, during which he hit one victim in the face, causing the man to fall, hit his head on the ground, and eventually die from his injuries. A jury acquitted Dowdell of murder, but convicted him of the lesser offense of voluntary manslaughter. (Pen. Code, § 192, subd. (a); count one.)[1] As to the decedent and another victim, the jury acquitted Dowdell of assault by means likely to produce great bodily injury (§ 245, subd. (a)(4)), but convicted him of the lesser offense of misdemeanor assault (§ 241).

On appeal, Dowdell argues: 1) the evidence was insufficient to support his voluntary manslaughter conviction; 2) the trial court erred in refusing to instruct on the lesser offense of involuntary manslaughter; 3) other errors or omissions in the voluntary manslaughter instruction resulted in the jury being allowed to find Dowdell guilty of voluntary manslaughter without finding he possessed the required mental state for that crime; and 4) the trial court erred in refusing the defense request for an instruction on excusable homicide based on accident occurring in the heat of passion. We agree the trial court's failure to instruct on the lesser offense of involuntary manslaughter was prejudicial error. Although we find sufficient evidence supported the voluntary manslaughter conviction we nevertheless reverse.

FACTUAL AND PROCEDURAL BACKGROUND

I. Prosecution Evidence

In the late evening of October 16, 2013, Palmdale resident Anthony Hopkins was taking out his trash when he saw four men arguing in the street. Three of the men were "Mexican," and one was African American. Two of the Latino men appeared to be drunk. Hopkins thought the three Latino men were going to beat up the African American man; he was surprised to be proved wrong. The African American man – later identified as Dowdell – walked or "charged" and hit one of the intoxicated men in the face three times, with hard, fast punches. Hopkins explained he knew the man who was hit was drunk because of his movements and the way he was hit: "He didn't put no

[1] All further statutory references are to the Penal Code unless otherwise specified.

defense up, no guard up, no nothing. It was like he seen it coming, but he couldn't react to it." The man who was hit, later identified as Nelson Zenteno, dropped to the ground, falling "like he was helpless." According to Hopkins, Dowdell kicked Zenteno with a hard kick to the upper chest area or back. Zenteno's two companions rushed in. One tried to pick up Zenteno, but Dowdell beat him, forcing him to leave Zenteno on the ground. Seeing Zenteno knocked out, Hopkins explained his thoughts: "I'm thinking it is kind of funny. I'm thinking he's just sleep. He just got beat up. He'll get up in five or ten minutes. But it wasn't nothing like that." Zenteno did not get up. Hopkins called the police. Eventually Hopkins saw Dowdell leave with another man. Hopkins recalled seeing a lot of blood on the ground.

Zenteno suffered subdural hemorrhages, leading to severe brain swelling. Surgeons removed portions of his skull to relieve the pressure. There were additional skull fractures caused by the bone and head impacting a blunt surface. At trial, the coroner opined the cause of death was trauma to the brain and skull. He further testified the kind of brain damage he witnessed in Zenteno could be the result of blunt-force trauma, caused "possibly by blows to the head" or the head striking a hard object while the body was falling. Zenteno's blood alcohol level was .424. However, the coroner opined a high blood alcohol level would not have had an effect on the subdural hematomas or the "evolving sequence of events that led to the decedent's death." The coroner observed no trauma to either of Zenteno's hands. Zenteno's lip was bruised or swollen, but his teeth were intact.

At trial, three individuals involved in the altercation testified in the People's case.

De Los Santos

According to Alejandro De Los Santos, on the day of the incident, he, Zenteno, and Jose Cisneros were together and had been drinking all day. Zenteno was drunk. De Los Santos and Zenteno were smoking cigarettes. They were walking while Cisneros slowly rode a bicycle next to them. They walked past Dowdell and another African American man, later identified as Joseph Mason. De Los Santos remembered only that he and Zenteno kept walking, but they looked back and saw Cisneros in an altercation

with Dowdell. De Los Santos could not remember what words were exchanged before the fighting started. He had previously told police he was not sure how the altercation started but stated: "I guess they misunderstood, thinking we said something racial back or something." At trial he denied hearing Cisneros use a racial slur. De Los Santos saw Cisneros trying to defend himself against Dowdell. De Los Santos told Mason, "Hey, calm your friend down."

According to De Los Santos, Zenteno stepped in to try to stop the fight, saying "stop," and making fists as Dowdell came toward him. De Los Santos testified Dowdell and Zenteno were two feet away from each other, but also that Dowdell took two or three quick strides to get close to Zenteno. Dowdell hit Zenteno twice. Zenteno fell to the ground and stopped moving. De Los Santos heard Zenteno's head hit the asphalt. Dowdell advanced toward De Los Santos. When De Los Santos backed up, Dowdell returned to Cisneros. De Los Santos and Mason dragged Zenteno to the sidewalk to get him out of the street and out of the path of moving cars.[2] Zenteno was unconscious and bleeding from his ears, mouth, and nose. De Los Santos tripped; Zenteno's head fell in his lap. Mason told De Los Santos that Dowdell was drunk and under the influence of another drug. After helping move Zenteno, Mason grabbed Dowdell and the two left.

On cross-examination, De Los Santos admitted he and Zenteno had been drinking together all day long, Zenteno was very drunk, and Zenteno became angry, belligerent, and hostile when drunk. A month before the incident, Zenteno got very drunk and began fighting with De Los Santos. De Los Santos hit Zenteno in the face four times, causing Zenteno to fall to the ground on his stomach. Each time he fell, Zenteno got up and tried to hit De Los Santos again. Yet, De Los Santos testified Zenteno controlled himself when drunk; he was only rowdy when provoked. De Los Santos said Zenteno was not aggressive during the encounter with Dowdell. He admitted telling police Zenteno was "ready to fight," but at trial insisted Zenteno was merely "ready to defend himself." De Los Santos did not see Dowdell kick Zenteno.

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[2] De Los Santos first testified that he moved Zenteno alone, but later he testified that Mason helped him move Zenteno to the sidewalk.

Cisneros

Cisneros testified that on the night of the incident he was sober but Zenteno was drunk. When they passed Mason and Dowdell, Mason asked Cisneros and his companions if they had a cigarette. They said no. Mason asked two more times; each time someone in Cisneros's group said they did not have a cigarette. They continued walking. Mason then said, "Y'all Mexicans don't speak English? Cigarette. Cigarette."[3] Cisneros fell behind his friends slightly. When he looked back, Dowdell "charged" him. Cisneros threw his bicycle down, took his backpack off, and began backing up. Cisneros told Dowdell, "Leave. Get out of here." Dowdell responded, " 'F[uck] that. F[uck] that,' " and continued running toward Cisneros, hitting him in the face. Mason got between Dowdell and Cisneros. He told Cisneros to leave, saying, "Get out of here, dude. He's coked out." Dowdell continued to try to punch Cisneros from behind Mason. When Mason moved, Dowdell approached and hit Cisneros a second time. The punch was hard.

At that point, Zenteno came toward them with his hands up, palms open, telling them to stop fighting. Dowdell turned around, "charged" at Zenteno, and hit him twice with two "upper cuts." Zenteno fell to the ground. His head hit the ground last. Dowdell hit Cisneros two more times. Mason got between Dowdell and Cisneros once more but he eventually walked away. Dowdell and Cisneros began wrestling while standing. Finally, Mason told Dowdell, "let's go," and they left. Cisneros's eye was swollen. He did not recall having any conversation with anyone about what happened or apologizing. He did not see Dowdell kick Zenteno in the head. On cross-examination, Cisneros denied making "clicking African sounds," or responding to the request for a cigarette other than to say they had no cigarettes. He testified he swung at Dowdell but did not hit him.

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[3] Cisneros told police Mason said, "Cigarro, Cigarro." Cisneros found this disrespectful.

Mason

On the night of the incident, Joseph Mason encountered Dowdell at an apartment complex in Mason's neighborhood.[4] They were drinking and hanging out at or near the complex. Dowdell seemed sober at the time. Mason saw three Latino men walking in the street. One of the men was smoking a cigarette. They looked like they might be intoxicated. Zenteno was walking between the two other men and they were helping him. The two were not holding Zenteno up or touching him, but Zenteno could not walk in a straight line. Mason could not say Zenteno appeared more intoxicated than the other two. De Los Santos was walking and stumbling.

Mason asked them for a cigarette. One of the men said, dismissively, "We don't have any cigarettes for you." Mason then offered to buy a cigarette from them. One of the men answered, "You don't understand English?" One of them made monkey sounds. Someone else said, "what?" and Cisneros dropped the bicycle. Mason told the men to keep walking but they did not. Mason was scared. He began to walk away. According to Mason, Dowdell moved to protect him. When Mason turned around he saw Cisneros fighting with Dowdell. Zenteno was on the ground on his back. Mason yelled at them to stop fighting, saying, "It's not worth it." Mason tried to break up the fight. He was unable to deescalate the situation and eventually gave up. He turned to leave, then returned and begged Dowdell to leave with him. They got into Mason's car and drove away. When they returned to Mason's apartment complex later that night, they encountered Cisneros. They all apologized to one another for what had happened, how things had gotten out of hand, and they acknowledged the fighting was uncalled for.[5]

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[4] Mason pled guilty to being an accessory after the fact for driving Dowdell away from the scene of the crime.

[5] At trial Mason admitted the police report summarizing an interview with him did not indicate he said Dowdell was present when Mason encountered Cisneros and they both apologized. Mason maintained the discrepancy occurred because the police never asked him if Dowdell was there.

On cross-examination, Mason testified "nigger" was said a couple times, but Mason was not sure who said it, or to whom it was addressed. Dowdell said, "Who are you addressing?" One of the men responded, "Who else is around here? Who else could we be talking to?" At that point, Cisneros put down his bike, Dowdell advanced to meet him, and the fight broke out.

Detective Robert Martindale investigated the incident. Martindale testified that many statements Dowdell made in an interview with police were uncorroborated by any other witness, and some statements contradicted what others said, including Mason. For example, Dowdell told police Zenteno rushed at him, then he hit Zenteno once. No other witness described the events as occurring in that way. No other witness told police the group of men used the word "nigger." Dowdell told police he had not been drinking before the incident, but Mason told police the opposite. Dowdell said Cisneros swung at him first; no other person interviewed by law enforcement indicated Cisneros took the first swing.

II. Defense Evidence

Dowdell presented expert testimony from an emergency medical physician. The expert opined a blow to the upper lip would not be fatal on its own. His review of the photographs and medical records indicated the only sign of trauma to Zenteno was lip swelling, which indicated at least one blow to the lip area, and there were symptoms related to a skull fracture on the back of the head. He opined that when Zenteno was brought to the hospital, his injury was survivable. The levels of bleeding and brain injury had not reached a level at which surgery was mandated. However, the expert opined that when the subdural hemorrhage had increased an hour and a half later, the injury was no longer survivable. The expert indicated alcoholics typically have brain shrinkage, rendering them more prone to subdural hemorrhages. He opined Zenteno's extremely high blood alcohol level contributed to the rapid rate at which the bleeding occurred. He concluded: "The bleeding progressed and continued at a very rapid rate, especially for a subdural hemorrhage," and "that killed him."

On cross-examination, the expert opined if surgery had been done after the results of Zenteno's first CT scan, the results would likely have been life-saving. However, he also admitted he could not say with 100 percent certainty that Zenteno would have survived. He admitted there was no indication in the autopsy or medical records that Zenteno had any cerebral atrophy, although he noted it would be difficult to tell from the autopsy because Zenteno's brain was swollen.

The defense also offered further testimony from Mason. Mason again testified that after the altercation, he and Dowdell encountered Cisneros in front of Mason's apartment building. According to Mason, Cisneros said that since he lived in the same building as Mason, he did not want things to escalate or get worse. He apologized about what had happened. Cisneros said he had a short temper and had been drinking. Cisneros further admitted that had he not had such a quick temper, the situation would not have escalated as it did.

Dowdell testified at trial. According to Dowdell, right before the altercation he and Mason were about to get into Mason's car to drive to the store. Dowdell heard Mason ask for a cigarette. He then saw three men walking by. One of them said, "Nigga, what this look like? A store?" Dowdell told Mason not to ask the men for anything and said he would buy some cigarettes when they got to the store. But Mason asked again, offering to buy a cigarette. One of them said, "He must don't understand English." They then made "African noises." Dowdell got angry. He asked, "What do you mean by that?" Cisneros responded, "Well, if you don't understand English, I'll say it in this language." Dowdell answered, "What do you mean by that? Because neither one of us is from Africa." Cisneros and Dowdell approached each other, yelling and cursing. Out of the corner of his eye, Dowdell saw Zenteno pull his arm free from De Los Santos and run over with balled fists. Zenteno approached Dowdell from the left and threw a punch at Dowdell. Dowdell ducked, then he hit Zenteno with his left hand. Dowdell knew only that he hit Zenteno somewhere in the face. Cisneros and Dowdell fought again, then wrestled. Finally, Cisneros said he was done. Dowdell let him go. Dowdell walked to Mason's car and rode away. He had no idea Zenteno was seriously injured.

When Dowdell and Mason returned to Mason's apartment, they encountered Cisneros. According to Dowdell, Cisneros was with two other men, one of whom had a gun. Dowdell explained what had happened; the man with a gun made Cisneros apologize. Mason apologized as well. Everyone shook hands. Dowdell testified he did not intend to kill Zenteno. He had no idea Zenteno had been seriously or mortally injured. He also denied using cocaine on the night of the incident, stating he had never in his life used drugs.

The jury found Dowdell not guilty of second degree murder and not guilty of assault by means likely to produce great bodily injury. The jury returned convictions for voluntary manslaughter and simple assault as to Zenteno. As to Cisneros, the jury found Dowdell not guilty of assault by means likely to produce great bodily injury, but guilty of simple assault. Dowdell was sentenced to a total prison term of 11 years.

DISCUSSION

I. The Trial Court's Failure to Instruct on Involuntary Manslaughter Was Prejudicial Error

On appeal, Dowdell contends the trial court erred by refusing to instruct the jury on involuntary manslaughter. We agree and conclude the error requires reversal.

A. Background

During a jury instructions conference, defense counsel requested that the court instruct the jury on involuntary manslaughter. Counsel argued Dowdell had testified he did not intend to kill Zenteno, and there was no evidence he acted with a conscious disregard for human life. Counsel further argued the evidence supported a theory of involuntary manslaughter based on a killing in the commission of a misdemeanor. The People opposed the request, arguing there was evidence of implied malice because Dowdell ran over to Zenteno and attacked him, unprovoked, despite Zenteno being visibly intoxicated. The prosecutor additionally contended there was evidence Dowdell intended to severely hurt Zenteno.

The trial court denied the defense request, explaining, "The court has a duty to instruct involuntary manslaughter as a lesser when there is sufficient evidence the defendant lacked malice. From what I heard so far, I don't agree with your argument that the defendant lacked any malice at all. So [CALCRIM No.] 580 will not be given."

B. The evidence was sufficient to warrant an instruction on involuntary manslaughter

"We independently review a trial court's failure to instruct on a lesser included offense. [Citation.] The court must, on its own initiative, instruct the jury on lesser included offenses when there is substantial evidence raising a question as to whether all the elements of a charged offense are present [citations], and when there is substantial evidence that the defendant committed the lesser included offense, which, if accepted by the trier of fact, would exculpate the defendant from guilt of the greater offense." (*People v. Cook* (2006) 39 Cal.4th 566, 596 (*Cook*).)

The People charged Dowdell with murder. (§ 187, subd. (a).) Voluntary manslaughter and involuntary manslaughter are both lesser included offenses of murder. (*People v. Thomas* (2012) 53 Cal.4th 771, 813.) "The elements of murder are an unlawful killing committed with malice aforethought. (§ 187.) The lesser included offense of manslaughter does not include the element of malice, which distinguishes it from the greater offense of murder. [Citation.] One commits involuntary manslaughter either by committing 'an unlawful act, not amounting to a felony' or by committing 'a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection.' (§ 192, subd. (b).)" (*Cook, supra*, 39 Cal.4th at p. 596.) Involuntary manslaughter may also occur when a noninherently dangerous felony is committed without due caution and circumspection. (*People v. Butler* (2010) 187 Cal.App.4th 998, 1006-1007 (*Butler*).)

"If the evidence presents a material issue of whether a killing was committed without malice, and if there is substantial evidence the defendant committed involuntary manslaughter, failing to instruct on involuntary manslaughter would violate the defendant's constitutional right to have the jury determine every material issue.

[Citation.] Malice is implied, however, when a killing results from an intentional act, the natural consequences of which are dangerous to human life, and the act is deliberately performed with knowledge of the danger to, and with conscious disregard for, human life." (*Cook, supra,* 39 Cal.4th at p. 596; *Butler, supra,*187 Cal.App.4th at pp. 1006-1007.)

"[C]riminal negligence is the governing mens rea standard for all three forms of committing the offense . . . [¶] . . . ' "[C]riminal negligence" ' exists when the defendant engages in conduct that is ' "aggravated, culpable, gross, or reckless" '; i.e., conduct that is ' "such a departure from what would be the conduct of an ordinarily prudent or careful man under the same circumstances as to be incompatible with a proper regard for human life, or, in other words, a disregard of human life or an indifference to consequences." ' . . . [¶] The performance of an act with criminal negligence supplies the criminal intent for involuntary manslaughter, regardless whether the conduct underlying the offense is a misdemeanor, a lawful act, or a noninherently dangerous felony. That is, when a defendant commits a misdemeanor in a manner dangerous to life, the defendant's conduct 'qualifies as gross negligence,' and culpability for involuntary manslaughter is warranted because the defendant has performed an act ' "under such circumstances as to supply the intent to do wrong and inflict some bodily injury." ' [Citations.]" (*Butler, supra,* 187 Cal.App.4th at pp. 1007-1008.)

" '[T]he existence of *"any* evidence, no matter how weak" will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is "substantial enough to merit consideration" by the jury. [Citations.] "Substantial evidence" in this context is " 'evidence from which a jury composed of reasonable [persons] could . . . conclude[ ]' " that the lesser offense, but not the greater, was committed.' " (*People v. Moye* (2009) 47 Cal.4th 537, 553 (*Moye*).)

There was evidence in this case sufficient to warrant an instruction on involuntary manslaughter. First, there was Dowdell's own testimony. "The testimony of a single witness, including the defendant, can constitute substantial evidence requiring the court

to instruct on its own initiative." (*People v. Lewis* (2001) 25 Cal.4th 610, 646.) Dowdell testified he did not intend to kill Zenteno. (See *People v. Rogers* (2006) 39 Cal.4th 826, 884 (*Rogers*) ["An instruction on involuntary manslaughter is required whenever there is substantial evidence indicating the defendant did not actually form the intent to kill."]) He also testified he punched Zenteno only once, and only after he saw Zenteno approach and swing at him. Dowdell testified he did not even see where the punch landed. While the jury may have discredited this testimony since it was contradicted by that of the other witnesses, it still could reasonably have believed Dowdell's intent was merely to neutralize Zenteno while he continued fighting Cisneros. If believed, this testimony would have supported a finding that Dowdell acted only with criminal negligence when he hit Zenteno, causing him to fall to the ground. (*Butler, supra,* 187 Cal.App.4th at p. 1015 ["For murder the defendant must have acted with intent to kill or conscious disregard for life; in contrast, for involuntary manslaughter the defendant must have acted *without* intent to kill or conscious disregard for life."].)

Second, there was evidence from which the jury could reasonably infer the blows Dowdell inflicted on Zenteno were not numerous or particularly severe. "This state has long recognized 'that an assault with the fist . . . may be made in such a manner and under such circumstances as to make the killing murder.' [Citation.] However, 'if the blows causing death are inflicted with the fist, and there are no aggravating circumstances, the law will not raise the implication of malice aforethought, which must exist to make the crime murder.' [Citation.]" (*People v. Cravens* (2012) 53 Cal.4th 500, 508 (*Cravens*).) Dowdell testified he punched Zenteno in the face once; De Los Santos and Cisneros testified Dowdell hit Zenteno twice. Although Cisneros testified Dowdell punched him hard, there was no evidence that, as to Zenteno, the fistfight was aggravated or involved blows likely to be fatal under most circumstances. Dowdell hit Cisneros at least four times, apparently without causing him any lasting injuries. Indeed, the jury eventually found Dowdell did not assault either Zenteno or Cisneros by means likely to produce great bodily injury. Hopkins's testimony that Dowdell punched Zenteno three times then kicked him was not corroborated by any other witness.

Third, evidence of Zenteno's vulnerability was in conflict. While several witnesses testified Zenteno was visibly intoxicated, there was also evidence Zenteno was walking under his own power. De Los Santos testified Zenteno appeared drunk, but immediately before the incident Zenteno's speech was clear, he was able to light his own cigarette, he was not having any trouble walking, and neither De Los Santos nor Cisneros had to help Zenteno walk. There was evidence Zenteno had the presence of mind to approach Dowdell and Cisneros as they fought to intervene in some fashion, and evidence he had balled his hands into fists. De Los Santos testified Zenteno was "ready to defend himself," and he admitted previously telling police Zenteno was "ready to fight." If believed, this evidence would have supported a finding that Zenteno was not so obviously inebriated that Dowdell knew Zenteno was impaired and extremely vulnerable to a punch while standing on asphalt.

Based on the trial testimony and all of the circumstances, the jury could reasonably have been persuaded that Dowdell acted without intent to kill. It could similarly reasonably have been persuaded that Dowdell did not subjectively appreciate the risk of his conduct, and instead, that he had a subjective, good faith belief that his actions posed no risk to Zenteno's life, even if that belief was objectively unreasonable. (*Butler, supra,* 187 Cal.App.4th at pp. 1008-1009.)

Cook, *supra*, offers an instructive contrast. In *Cook*, the evidence conclusively established the defendant severely beat the victim. An eyewitness saw the defendant fighting with the victim and hitting the victim with a stick once the victim fell to the ground. Although the witness coaxed the defendant into her car, after the car turned the corner the defendant jumped out and ran back to the victim to continue the beating. The victim's head was severely battered. Bloodstained, broken pieces of board were found near the body. (*Cook, supra,* 39 Cal.4th at p. 574.) According to a pathology report, the victim died as a result of aspirating blood into his lungs from extensive head and face injuries, including broken facial bones and ruptured eyeballs. (*Id.* at p. 575.) The injuries were consistent with a severe beating.

The *Cook* court rejected the defendant's argument that the trial court should have instructed the jury on involuntary manslaughter. The court explained that because the evidence conclusively established the defendant brutally beat the victim with a board, the jury "could not have found that defendant committed a mere misdemeanor battery by administering that beating. Nor was there any evidence that defendant lawfully attacked [the victim] and continued to beat his head with a board, unaware that [the victim] could die from the beating. Defendant did not simply start a fistfight in which an unlucky blow resulted in the victim's death. He savagely beat [the victim] to death. Because the evidence presented at trial did not raise a material issue as to whether defendant acted without malice, the trial court was not obliged, on its own initiative, to instruct the jury on involuntary manslaughter as to [the victim]." (*Cook, supra,* 39 Cal.4th at pp. 596-597.)

Likewise, in *People v. Evers* (1992) 10 Cal.App.4th 588, the court concluded there was no error in the court's failure to instruct on involuntary manslaughter where the injuries suffered by the victim—a child—were severe, and evidence of the defendant parent's prior child abuse established he was aware of the risk of his actions. There was undisputed evidence the deceased child suffered physical injuries equivalent to those that would result from a 10-to-30-foot fall. (*Id.* at p. 597.) The record established the defendant intentionally used violent force against the child, knowing the probable consequences of his actions, and he therefore could not be said to have acted without realizing the risk of death or serious bodily injury. (*Id.* at p. 598.)

In contrast, here there was no evidence Dowdell savagely beat Zenteno to death. At most, the *disputed* evidence was that Dowdell punched Zenteno three times and kicked him once in the chest. But there was also evidence offered in both the prosecution and defense cases that Dowdell punched Zenteno once or twice and did not kick him at all. (*People v. Lewis, supra,* 25 Cal.4th at p. 646 [testimony of even a single witness can constitute substantial evidence requiring instruction].) Moreover, while it was undisputed that Zenteno was visibly inebriated, there was no evidence Zenteno was unaware of Dowdell's physical aggression, or that it would have taken him by surprise. As noted

above, De Los Santos admitted he told police Zenteno was "ready to fight"; even at trial De Los Santos testified Zenteno was "ready to defend himself." (*See Cravens, supra,* 53 Cal.4th at p. 509 [evidence that defendant "sucker punched" impaired victim helped establish implied malice].) If Zenteno appeared ready to defend himself, the jury could reasonably conclude Dowdell would have little reason to believe or understand that one or two punches would pose a high risk of death or serious bodily injury to Zenteno.

The pathologist testified the force that would cause the type of brain damage he observed "could be caused by blunt-force trauma . . . possibly by blows to the head, or it could be caused by the head – while a body was falling, a head striking a hard object and causing rapid deceleration of the brain. . . ." In other words, the severe brain damage Zenteno suffered could have been due to blows to the head *or* the impact of his head hitting the ground. There was evidence that Zenteno's lip was swollen and bruised, but his teeth were intact. There was no evidence of other extensive injuries to Zenteno's face or head, such as broken facial bones or damaged teeth. (See e.g., *Cook, supra*, 39 Cal.4th at p. 575; *People v. Cayer* (1951) 102 Cal.App.2d 643, 645-649 [malice established where defendant knocked victim down repeatedly; defendant got on top of victim and hit him in the face and chest; defendant kicked victim in the head, face and ribs; victim was covered with blood and there was blood on the walls; victim was not fighting back].)

In this case, the jury reasonably *could* have found Dowdell "start[ed] a fistfight in which an unlucky blow resulted in the victim's death." (*Cook, supra,* 39 Cal.4th at p. 597.) As such, the "misdemeanor manslaughter" theory of involuntary manslaughter would have applied. Evidence that an unlawful killing without malice occurred in the commission of an unlawful act not amounting to a felony establishes a form of involuntary manslaughter. (*People v. Lee* (1999) 20 Cal.4th 47, 60-61 (*Lee*) [trial court erred in failing to sua sponte instruct on misdemeanor manslaughter theory of involuntary manslaughter].)

In fact, as Witkin notes, the "great majority" of cases regarding killing in the commission of a misdemeanor—one of the three theories of involuntary manslaughter—"involve simple assault or battery." (1 Witkin, Cal. Crim. Law 4th (2012) § 250,

p. 1075.) There was evidence Dowdell violated Penal Code section 241, simple assault. Consistent with this evidence, the jury in this case found Dowdell *not guilty* of felony assault, concluding he was guilty of only simple assault, a misdemeanor. The evidence would have allowed the jury to find Dowdell guilty of a killing without malice, occurring in the commission of a misdemeanor. (See e.g., *People v. Jackson* (1962) 202 Cal.App.2d 179, 181, 183 [evidence supported finding of involuntary manslaughter where defendant beat deceased in fight and banged deceased's head on pavement].)

The evidence raised a material issue as to whether Dowdell acted without intent to kill and without conscious disregard for life. There was evidence from which a rational trier of fact could find beyond a reasonable doubt that Dowdell killed Zenteno in the commission of an unlawful act not amounting to a felony, and without malice. (*People v. Moye, supra,* 47 Cal.4th at p. 556 ["In deciding whether evidence is "substantial" in this context, a court determines only its bare legal sufficiency, not its weight."]; *People v. Berryman* (1993) 6 Cal.4th 1048, 1081, overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.) The trial court was thus obliged to instruct the jury on involuntary manslaughter.

C. Prejudice

However, reversal is not required unless it is "reasonably probable defendant would have obtained a more favorable outcome had the jury been so instructed." (*Moye, supra,* 47 Cal.4th at p. 556.) Our review " 'focuses not on what a reasonable jury *could* do, but what such a jury is *likely* to have done in the absence of the error under consideration. In making that evaluation, an appellate court may consider, among other things, whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result.' " (*Ibid.*)

In this case, there is a reasonable probability that had the jury been instructed on involuntary manslaughter, Dowdell would have obtained a more favorable outcome. The evidence was that Dowdell and Cisneros fought, and during that altercation, Dowdell

hit Zenteno between one and three times. Zenteno's two associates testified Dowdell punched Zenteno twice. Testimony that Dowdell kicked Zenteno in the chest was not corroborated by any other evidence, including the testimony of Cisneros and De Los Santos, both of whom were closer to the altercation than Hopkins. The extent of Zenteno's visible vulnerability was not conclusively established. There was little evidence indicating Dowdell's altercation with Zenteno was aggravated in such a way that the jury would necessarily have concluded Dowdell intended to kill Zenteno, or that he subjectively appreciated the risk of his conduct to Zenteno's life.[6] (*Butler, supra,* 187 Cal.App.4th at pp. 1008-1009.) Dowdell testified he did not think Zenteno was seriously or fatally injured. Moreover, the jury found Dowdell not guilty of assault by means likely to produce great bodily injury. This strongly suggests that had the jury been presented with another option, it would not have concluded there were any circumstances indicating Dowdell acted with a mental state greater than criminal negligence. It is reasonably probable that had the jury been instructed on another lesser theory of unlawful killing it would have found Dowdell guilty of that lesser offense.

The People argue the jury found Dowdell guilty of voluntary manslaughter, thus the jury had to find Dowdell acted with malice, malice that was negated by heat of passion and provocation. But the voluntary manslaughter conviction does not establish the jury necessarily rejected a finding that Dowdell unlawfully killed Zenteno with a mental state less culpable than implied malice. Once the jury found Dowdell not guilty of murder, its only option was to convict him of voluntary manslaughter or find him not criminally liable for Zenteno's death.

Courts are required to instruct on lesser included offenses because, "[w]here the evidence warrants, the rule ensures that the jury will be exposed to the full range of verdict options which, by operation of law and with full notice to both parties, are

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[6] Even Hopkins, the witness who offered the most egregious version of Dowdell's actions, testified he thought that when Zenteno fell to the ground he would get up a few minutes later. This suggests the risk of death or serious bodily harm to Zenteno from Dowdell's conduct may not have been apparent before Zenteno fell to the ground.

presented in *the accusatory pleading itself* and are thus closely and openly connected to the case. In this context, the rule prevents either party, whether by design or inadvertence, from forcing an all-or-nothing choice between conviction of the stated offense on the one hand, or complete acquittal on the other. Hence, the rule encourages a verdict, within the charge chosen by the prosecution, that is neither 'harsher [n]or more lenient than the evidence merits.' " (*People v. Birks* (1998) 19 Cal.4th 108, 119.)

In this case, the jury rejected Dowdell's self-defense argument, indicating it believed there was an unlawful, unjustified killing. Yet, it also found Dowdell not guilty of assault by means likely to produce great bodily injury, indicating it accepted at least some of the evidence favorable to Dowdell. This suggests that had the jury had the option, it may also have concluded Dowdell did not act with intent to kill or with conscious disregard for life, even though he caused Zenteno's death. Although we conclude below that the evidence was sufficient to support a voluntary manslaughter conviction, we disagree with the People's assertion that the evidence supporting that conviction was so strong that we can confidently conclude the jury would have reached the same result had it been instructed on another option to find Dowdell criminally liable for Zenteno's death. Nor is this a case in which the jury rejected other lesser theories in favor of one requiring a more culpable mental state, thereby indicating it necessarily would have found Dowdell guilty of a crime greater than involuntary manslaughter, even with an instruction. (See *Rogers, supra,* 39 Cal.4th at p. 884 [failure to instruct on involuntary manslaughter harmless where court instructed on second degree murder and voluntary manslaughter, but jury convicted defendant of first degree murder].) It is reasonably probable Dowdell would have achieved a more favorable result had the trial court instructed on involuntary manslaughter. (*People v. Breverman* (1998) 19 Cal.4th 142, 149, citing *People v. Watson* (1956) 46 Cal.2d 818, 836.)

II. Voluntary Manslaughter — Sufficiency of the Evidence

As Dowdell may be retried on count one, we must consider his argument that there was insufficient evidence to support the voluntary manslaughter conviction. We reject the claim.

When evaluating a claim of insufficiency of the evidence we review the entire record in the light most favorable to the judgment to determine whether it contains evidence that is " 'reasonable, credible, and of solid value such that a reasonable jury could find the defendant guilty beyond a reasonable doubt.' [Citation.]" (*People v. Smith* (2014) 60 Cal.4th 603, 617.) We do not reevaluate witness credibility on appeal, but instead defer to the trier of fact because " ' "it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends." ' " (*People v. White* (2014) 230 Cal.App.4th 305, 315, fn. 13.) " ' " ' "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment." ' [Citations.]" [Citation.]' [Citations.] The conviction shall stand 'unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction]." ' [Citation.]" (*Cravens, supra,* 53 Cal.4th at p. 508.)

"[A] conviction of voluntary manslaughter can be sustained under instructions which require, and evidence which shows, that the defendant killed intentionally and unlawfully." (*People v. Rios* (2000) 23 Cal.4th 450, 463.) "A defendant commits voluntary manslaughter when a homicide that is committed either with intent to kill or with conscious disregard for life—and therefore would normally constitute murder—is nevertheless reduced or mitigated to manslaughter."[7] (*People v. Bryant* (2013) 56 Cal.4th 959, 968.)

Dowdell contends there was no substantial evidence he had the intent to kill, or that he knew his conduct endangered Zenteno's life and he acted with conscious disregard for life. (*People v. Bryant, supra,* 56 Cal.4th at pp. 968-969 [voluntary manslaughter requires either intent to kill or conscious disregard for life; conscious

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[7] A homicide may be reduced or mitigated to manslaughter "when the defendant acts upon a sudden quarrel or heat of passion on sufficient provocation (§ 192, subd. (a)), or kills in the unreasonable, but good faith, belief that deadly force is necessary in self-defense. [Citation.] Only these circumstances negate malice when a defendant intends to kill. [Citation.]" (*Lee, supra,* 20 Cal.4th at p. 59.)

disregard refers to the mental component of implied malice].) We disagree. As explained above, the evidence offered in this case was disputed and various inferences could have been drawn from the witnesses' testimony. Although the jury could have believed Dowdell's testimony in some areas and concluded he was guilty only of involuntary manslaughter, it also could reasonably interpret the evidence differently and find him guilty of voluntary manslaughter.

One permissible interpretation of the evidence was that Dowdell must have known Zenteno was intoxicated and vulnerable. There was evidence that Zenteno intervened to try to stop the fight between Dowdell and Cisneros and that he did so without making fists or physically attempting to engage Dowdell. There was also evidence that Dowdell then rushed toward Zenteno and punched him multiple times in the face, even though Zenteno was unable to defend himself or retaliate after even the first punch. A single punch that leads to death may be sufficient to support a finding of implied malice. (*Cravens, supra,* 53 Cal.4th at pp. 508-509 [victim was extremely intoxicated and exhausted; single extremely hard "sucker punch" caused victim to fall and hit head on hard ground; evidence supported finding of implied malice]; *People v. Alexander* (1923) 62 Cal.App. 306, 308 [implied malice where defendant, unprovoked, deliberately pursued victim and struck blow while victim had his left hand in his pocket and defendant held the other hand, causing the victim to fall backwards, hitting his head on hard pavement "and without any opportunity of defending himself against the fall"].)

There was further evidence that Dowdell was punching hard that night. (*Cravens, supra,* 53 Cal.4th at p. 509.) The jury could conclude Dowdell's multiple blows to the very inebriated Zenteno, who was unable to react or defend himself, "guaranteed that [he] would fall on a very hard surface, such as the pavement or the concrete curb. 'The consequences which would follow a fall upon a concrete walk must have been known to [defendant].' [Citation.]" (*Cravens, supra,* 53 Cal.4th at p. 509.) "[T]he jury was entitled to infer [Dowdell's] subjective awareness that his conduct endangered [Zenteno's] life from the circumstances of the attack alone, the natural consequences of which were dangerous to human life." (*Id.* at p. 511.)

The jury could also conclude Dowdell was subjectively aware that his conduct endangered Zenteno's life and he acted in conscious disregard of that risk based on evidence that Dowdell knocked Zenteno unconscious, but even as Zenteno lay motionless on the ground, Dowdell kicked him, then Cisneros had to rush in to try to get Dowdell away from Zenteno. De Los Santos had to drag Zenteno out of the street to avoid traffic, yet Dowdell continued fighting Cisneros and did not seek to ascertain Zenteno's condition or secure emergency assistance. (See *Cravens*, *supra*, 53 Cal.4th at p. 511.)

There was substantial evidence to support a finding that Dowdell knew his conduct endangered the life of another and he acted with a conscious disregard for life. (*Cravens*, *supra*, 53 Cal.4th at p. 508.)

III. Conclusion

In light of our determination that the conviction on count one must be reversed due to the trial court's failure to instruct the jury on involuntary manslaughter, we need not address Dowdell's additional arguments regarding instructional error he asserts affected that count. Defendant does not challenge his convictions for simple assault.

DISPOSITION

The judgment is reversed as to count one only and the case is remanded for further proceedings. In all other respects the judgment is affirmed.

BIGELOW, P.J.

We concur:

RUBIN, J.

GRIMES, J.